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May 24, 2013

Via Chief Clerk's e-filing System

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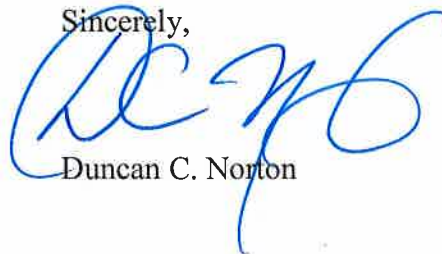
RE: TCEQ Docket No.: 2013-0589-MWD
Chappell Hill Service Company, LLC
Permit No. WQ 0015031001
Response to Hearing Requests

Dear Ms. Bohac:

Enclosed for filing in the above referenced matter please find Applicant Chappell Hill Service Company, LLC's Response to Hearing Requests. All parties of record have been copied pursuant to the Certificate of Service attached to the document.

Should you have any questions, please do not hesitate to contact me at (512) 322-5884. Thank you for your attention to this matter.

Sincerely,



Duncan C. Norton

DCN/jaj

Enclosure

cc: S. J. Gaido
Steve Barry
See Certificate of Service

TCEQ DOCKET NO. 2013-0589-MWD

APPLICATION BY	§	BEFORE THE
CHAPPELL HILL Service Company, LLC	§	TEXAS COMMISSION ON
TPDES PERMIT NO. WQ0015031001	§	ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUESTS FOR HEARING

Applicant Chappell Hill Service Company, LLC ("CHSC") files this its Response to Requests for Hearing pursuant to 30 TAC §55.209(d) and other applicable rules of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"), and respectfully shows the following:

I. INTRODUCTION

CHSC has applied to the TCEQ for new Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0015031001 to authorize the discharge of treated domestic wastewater to serve a planned mixed use commercial and residential development and existing unserved the community of Chappell Hill in Washington County, Texas. Upon final approval by the TCEQ the facility would discharge a maximum of 400,000 gallons per day ("gpd") to an unnamed tributary; then to Little Cedar Creek; then to New Year Creek; and ultimately to the Brazos River below its confluence with the Navasota River in Segment 1202 of the Brazos River Basin. The wastewater treatment facility would be located approximately 0.25 miles north of and 0.35 miles east of the intersection of Farm-to-Market Road 1155 and Highway 290 in Washington County.

On February 6, 2012, CHSC submitted its application to the TCEQ. The Executive Director ("ED") declared the application administratively complete on February 29, 2012. The Notice of Receipt of Application and Intent to Obtain a Permit was published in the Brenham Banner-Press on March 2, 2012. The ED completed the technical review of the Application on

May 17, 2012 and prepared a draft permit. The Notice of Application and Preliminary Decision was published in the Brenham Banner-Press July 6, 2012.

Following notice, a public meeting was held on December 11, 2012 at the Chappell Hill Volunteer Fire Department. The initial comment period for this Application was completed at the close of that meeting and the ED issued his Response to Public Comments ("RTC") on February 19, 2013.

CHSC has identified 6 hearing requesters that are seeking a contested case hearing: Mark Cegielski, David S. and Elizabeth Lancaster, Maureen and Thomas Holy, Laura Snell, John Calderone and Texas State Senator John Whitmire.

II. ORGANIZATION OF RESPONSE

Section 55.211 of the TCEQ rules provides that a request for a contested case hearing shall be granted if the request is made by an "affected person" and it:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter... and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of §55.201 regarding timing and contents of hearing requests.

30 TAC §55.211(c)(2).

Section 55.209 states that responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing . . . ;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

Id. at 55.209(e).

This response is organized to address each of these requirements. Section III discusses whether each hearing requestor is an "affected person." Section IV interprets and restates the particular issues raised by the five affected hearing requesters and discusses the issues eligible for referral. Section V discusses the hearing requests filed by the Lancasters and Sen. Whitmire after the close of the comment period. Section VI discusses the maximum expected duration of the hearing. Section VII addresses mediation. Finally, the conclusion and prayer (Section VIII); which includes a list of all issues that are appropriate for referral in terminology appropriate for referral, considering the relevant TCEQ regulatory language.

III. DETERMINATION OF AFFECTED PERSONS (§55.209(E)(1))

The Commission's rules provide that:

[A]n affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

Id. at §55.203(a). In determining whether an individual is an affected person, the rules require consideration of:

... all factors ... including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person; [and]
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person ...".

Id. at §55.203(c).

CHSC has **no objection** to an affirmative determination of affectedness and the granting of party status to:

1. Mark Cegielski
2. David S. and Elizabeth Lancaster
3. Maureen and Thomas Holy
4. Laura Snell
5. Sen. John Whitmire

CHSC does object to the inclusion of Mr. John Calderone as an affected person. Mr. Calderone's address is listed as 10850 Old Stagecoach Rd, Chappell Hill Tx. 77426. This address is more than 1.5 miles downstream of the proposed discharge point and does not abut the unnamed tributary that comprises the immediate discharge route. Instead, according to his hearing request, his property is adjacent to Little Cedar Creek downstream of the confluence of the unnamed tributary and Little Cedar Creek. His undisputed lack of proximity to the discharge point and the limited 400,000 gpd proposed discharge render him unlikely to be affected by this application. If Mr. Calderone wishes to proceed with his claim of affectedness, the Applicant suggests that he be required to appear at the preliminary State Office of Administrative Hearings ("SOAH") hearing and present the factual and legal basis of his claim to the Administrative Law Judge ("ALJ") for a ruling on his party status.

IV. ISSUES FOR REFERRAL (§55.209(e)(2-6))

Once the "affected person" analysis has occurred and eligible parties have been identified, the Commission must determine which issues that have been raised by an affected person in a valid hearing request should be referred to the State Office of Administrative Hearings ("SOAH") for consideration in the contested case hearing. *See* TEX. WATER CODE ANN. §5.556. Section 5.556 also requires the Commission to limit both the number and scope of issues that are referred to SOAH for hearing. *Id.*

CHSC's understanding of the issues sought to be raised by the five requesters who we assert to be affected persons in Section III above is based on the below listed letters in which the affected requesters requested a contested case:

1. March 17, 2013 letter from Elizabeth and David S. Lancaster;
2. Letter dated July 5, 2012 and received by the TCEQ Chief Clerk's office on July 26, 2012 from Mark Cegielski;
3. July 10, 2012 letter from Maureen and Thomas Holy;
4. June 29, 2012 letter from Laura Snell;
5. Two letters dated January 22 and January 31, 2013 from Sen. John Whitmire; and

Since the hearing requesters have not stated their issues in language that directly translates into or cross-references to applicable regulatory provisions, we attempted to restate their concerns in language that more closely tracks traditional regulatory language and, therefore, provides all parties with a clearer understanding of the issues in dispute. CHSC's efforts in this regard closely track the same efforts undertaken by the Executive Director in its Response to Comments.

Issues Presented

1. (ED's Response to Comment 1) This issue was raised in various forms in the hearing requests submitted by Cegielski, the Holys, the Lancasters and Snell. Whether the application proposes a discharge route that represents the "bed and banks of a watercourse that qualifies as a State watercourse pursuant to Texas law."

CHSC does **not object** to this issue as phrased above. However, CHSC does object to any issue related to requiring landowner permission or whether property rights of the requesters are affected by the discharge. Those issues are not within TCEQ's statutory authority and cannot be the basis of denial of CHCS's application.

2. (ED's Response to Comment 2) This issue was raised in the requests by Cegielski and Snell. Whether the application proposes the discharge of a majority of the town's human waste into a water course running through their property.

This issue does not comply with the requirements of 30 TAC Sec. 55.201(d) (4) in that it does not raise a relevant and material disputed fact issue. Those requests do not and cannot cite any relevant TCEQ regulation that limits wastewater discharges based on the area or community to be served by the proposed facility. The TCEQ regulations applicable to that issue are found in 30 TAC Chapter 291. This application is not being sought under that chapter and therefore the issue is not relevant and material.

3. (ED's Response to Comment 3). This issue was submitted by Cegielski and Snell. Paraphrasing the ED's framing of this comment; the issue can be stated as whether the discharge will render portions of their land inaccessible and whether the proposed discharge route is a "low spot in their pasture" and not an appropriate discharge route for the proposed volume of wastewater. This issue is relevant only to the extent that it parallels Issue 1. If the applicant's discharge route is a State water body with a bed and banks, then it is within the

TCEQ's authority to permit a treated wastewater discharge into it. For this reason, this issue need not be referred separately from Issue 1.

4. (ED's Response to Comment 4). Cegielski, the Holys, the Lancasters and Snell all raised the issue of whether the wastewater will be safe for people, livestock, pets and plants. CHSC does not object to this issue if properly framed to adhere to the requirements of the TCEQ regulations. CHCS submits that the appropriate issue for referral is "whether the application shows that the Texas Surface Water Quality Standards will be met and the whether the facility is designed and will be operated such that the effluent is properly disinfected prior to discharge."

5. (ED's Response to Comment 5). Cegielski, the Holys, the Lancasters and Snell all expressed concerns about whether the additional volume of water would cause or contribute to flooding. TCEQ regulations do not require applicants to prove their discharges will not cause or contribute to flooding along the discharge route beyond what may be subsumed by Issue 1 above herein. Beyond that, the issue is not relevant and material to the application and is inappropriate for referral.

6. (ED's Response to Comment 6). Cegielski, the Lancasters and Snell each raised the issue of the facility's proximity to their properties and specifically mentioned odor, noise, light pollution, mosquitos and general aesthetics of the facility. TCEQ regulations address these issues only to the extent of requiring a "150-foot buffer zone" from the facility to any abutting property line. Therefore the appropriate issue for referral is "whether the application complies with TCEQ regulations regarding buffer zones as found in 30 TAC Sec. 309.13."

7. (ED's Response to Comment 7). Cegielski, the Holys, the Lancasters and Snell have identified adverse impacts on their property values as a concern. As stated in the ED's

RTC, the TCEQ does not have jurisdiction over impacts on property values from any of the various permits it issues and therefore this issue is inappropriate for referral.

8. (ED's Response to Comment 8). Cegielski and Snell raise the issue of whether there may be other alternatives to manage the wastewater from the applicant's proposed development that might have a lesser impact on them, and suggest a tertiary treatment of the wastewater prior to discharge. CHSC responds that the protestants have cited no rule or statute that requires the consideration of alternate methods of wastewater management. Other than regionalization consideration requirements (TWC Sec 26.0282), there are no applicable regulations. Therefore, the only appropriate issue for referral is "whether the application complies with the regionalization consideration requirements in TWC Sec. 26.0282."

As to the "tertiary treatment" preference raised in the Holys' letter, TCEQ authority is limited to receiving, reviewing and deciding whether an application will meet the applicable requirements. It cannot mandate the type of application an applicant may file. This application, which requests approval of a secondary treatment level of 20 mg/l BOD, 20 mg/l TSS, and 2mg/l DO in the first phase, and 10/15 with a 4 DO minimum and 3mg/l Ammonia Nitrogen in the final phase, must be judged by the TCEQ against the applicable rules and decided upon as filed by the applicant. There is no relevant and material issue that is appropriate for referral relative to whether the applicant should have filed its application differently.

9. (ED's Response to Comment 9). The Holys, the Lancasters and Snell raise concerns about whether the facility ownership may change. TCEQ regulations state that permits are not transferrable without a separate application to TCEQ in advance of the proposed sale. Separate procedures in the regulations govern such transactions and permit transferees are vetted through that process. It is not a regulatory requirement to address speculative transfers in a new

or amended water quality permit application. The issue is not relevant and material to this application and is not appropriate for referral.

10. (ED's Response to Comment 10). Cegielski, the Holys and the Lancasters raised questions about maintenance of the facility. The draft permit and TCEQ operational standards address maintenance through the reporting and monitoring requirements and the mandate to employ an appropriately licensed operator. CHSC has no objection to the referral of the limited issue of "whether the application and permit require the employment of a properly licensed operator to oversee the operation and maintenance of the facility and whether the permit requires the applicant to properly maintain the facility according to TCEQ regulations."

11. (ED's Response to Comment 11). The Holys and the Lancasters raise concerns regarding the release of untreated wastewater during heavy rains and Lancaster expanded that to include protection of the facility from a 100-year flood. CHSC has no objection to the referral of the issue of "whether the application complies with TCEQ regulations regarding the prevention of the unauthorized discharge of wastewater during heavy rainfall and facility protection from a 100-year rainfall event."

12. (Response to Comment 12). The Holys and the Lancasters express concern that CHSC will profit at the expense of their interests. There is no statutory or regulatory support for consideration of an applicant's profit motive as a part of a wastewater discharge application. This issue is not relevant and material and cannot be referred.

13. (Response to Comment 13). The Lancasters raised the issue of potential impacts on Chappell Hill Water Supply Corporation's water wells. As stated in the ED's RTC, the TSWQS ensure the protection of surface water quality and, therefore, also provide protection for

groundwater resources. Therefore this issue is subsumed by the issue recommended for referral in paragraph 4, above herein.

14. (Response to Comment 14). The Lancasters asked how the water quality is monitored and who receives the monitoring and violation reports. CHSC has no objection to the referral of an issue as to “whether the application and draft permit contain monitoring and reporting requirements that comply with applicable regulations of the TCEQ.”

15. (ED’s Response to Comment 15). This issue was not raised in a hearing request.

16. (ED’s Response to Comment 16). The Lancasters’ request asks what would happen if the project fails or is abandoned. The rules and regulations regarding the failure or abandonment of the project does not obviate the applicant’s responsibility to comply with TCEQ regulations regarding the proper operation of the facility or the discharge limits found in the application. The applicant has no independent regulatory burden to address this speculative scenario in its permit application. TCEQ’s enforcement program and receivership program address such issues and are beyond the purview of this application. This issue is not relevant and material and is not appropriate for referral to the contested case.

17. (ED’s Response to Comment 17). The Lancasters state that they were not properly notified. The applicant has no objection to the referral of “whether or not the applicant provided proper notice of its application as required by the TCEQ regulations”.

18. (ED’s Response to Comments 18-20). These issues were not raised by a hearing requester.

19. (ED’s Response to Comment 21). Cegielski, Holy and Lancaster express concern about erosion. There is no regulatory requirement in wastewater discharge under the TCEQ Water Quality program that authorizes the consideration of erosion as part of permitting. This

issue is not relevant and material and is not appropriate for referral to the contested case on this matter.

20 (ED's Response to Comment 22). The Lancasters' hearing request inquired about retention ponds and asked for additional information. Retention ponds were not brought up in the request as a disputed issue of fact and therefore are not appropriate for referral to the contested case. Further, CHSC stipulates that the application, as currently drafted, contains no provisions for construction of retention ponds.

21. (ED's Response to Comment 23). Snell expressed concern that the facility may increase in size. This application is for a 400,000 gpd discharge and that has not changed or been revised since the application was declared technically complete. Any further expansion would require a new application and the associated TCEQ review, notice, comment and hearing request procedures. The issue of whether that may occur in the future is not relevant and material to this application. Therefore this issue is not appropriate for referral to the contested case hearing on this matter. For the record, at this time CHSC currently has no plans for any such expansion.

V. POST-RTC HEARING REQUESTS BY SEN. WHITMIRE AND THE LANCASTERS

Senator Whitmire's hearing request was filed in two separate letters dated January 22 and January 31, 2013. The earlier letter requests a contested case hearing but does not include any specification of issues to be referred, nor does it contain any discussion of how Sen. Whitmire would qualify as an affected person. The second letter states that he is "an affected property owner" and lists four separate concerns: 1) potential harm to human health; 2) water quality concerns including the contamination of nearby natural springs and New Year's Creek which is a

tributary to the Brazos River; 3) environmental concerns including pollution, odor, and harmful chemical deposits such as sodium; and 4) damage to nearby agriculture, farming and ranching.

The letter also contains a statement of concern regarding a) the applicant selling the property after permitting; b) the applicant using the best technology available and c) this permitting being a wrongful taking of his property.

CHCS believes that Sen. Whitmire's concerns identified as items 1-4 above all coincide with the issues addressed in paragraphs IV. 4 and 6 above, and as such has no objection to their referral to the extent recommended in those paragraphs. Sen. Whitmire's statement in a) above is similarly addressed in IV. 9. above. Sen. Whitmire's statement (item b) above) regarding best technology available has no basis in TCEQ's Water Quality rules. TCEQ does require the use of "best available technology" in certain of its Air Quality permit programs, but not in water quality permitting. Therefore, the issue is not appropriate for contested case consideration in this matter. Finally, Sen. Whitmire considers the approval of the application to be a wrongful taking of his property (item c) above). Paragraph IV. 1. and 7. address this issue, as does the ED's Response to Comment 1 in the RTC. Recent Texas case law (*Dormel v. City of Georgetown*, 6 S.W. 3d 349 Tex. App.-Austin 1999) holds that "the State has the right to use the channel of the watercourse to meet its constitutionally mandated duty to conserve and develop the State's water resources" and no authority from downstream landowners was needed. No TCEQ regulations support the consideration of whether a wastewater discharge permit application represents a wrongful taking of downstream property rights. This issue is not appropriate for referral either.

CHSC's application identifies Sen. Whitmire as a property owner adjacent to the discharge route within one mile downstream of the discharge point. Therefore, as stated in III. above, it has no objection to Sen. Whitmire being considered an affected person and a party to

the contested case. The Lancasters filed detailed comments during the comment period and a hearing request letter based on those comments during the hearing request period. Their March 17, 2013 post-RTC letter contains the same issues they previously raised, though somewhat re-phrased. As such, the Lancasters' issues are addressed in Section IV above.

VI. DURATION OF HEARING (§55.209(e)(7))

Responses to hearing requests must address the maximum expected duration of the hearing from the first day of the preliminary hearing to the issuance of the proposal for decision. CHSC suggests that, given the limited number of parties and the average number of issues, seven (7) months is an appropriate duration.

VII. MEDIATION

CHSC has already engaged the TCEQ Alternative Dispute Resolution Office to seek mediation with the hearing requesters and respectfully requests that the mediation process be allowed to run concurrently with the hearing request process and the establishment of a preliminary hearing date.

VIII. PRAYER

CHSC does not object to a finding that Mark Cegielski, Elizabeth and David S. Lancaster, Thomas and Maureen Holy, Laura Snell and Sen. John Whitmire are affected persons and may be granted party status in the contested case hearing on this matter.

CHSC submits that the issues listed in the Table 1 below, and only those issues, should be referred to SOAH for consideration in the contested case hearing.

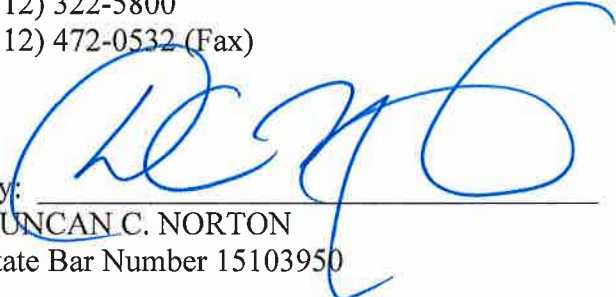
Table 1 – Issues for Referral

REFERRAL ISSUES
Whether the application proposes a discharge route that represents the “bed and banks of a watercourse that qualifies as a State watercourse pursuant to Texas law, as set forth in TWC § 26.027.
Whether the application shows that the Texas Surface Water Quality Standards will be met and the whether the facility is designed and will be operated such that the effluent is properly disinfected prior to discharge, as set forth in the applicable sections of 30 TAC Chapter 307.
Whether the application complies with TCEQ regulations regarding buffer zones, as set forth in 30 TAC Sec. 309.13(e)(1).
Whether the application complies with regionalization consideration requirements, as set forth in TWC Sec. 26.0282.
Whether the application and permit require the employment of a properly licensed operator to oversee the operation and maintenance of the facility and whether the permit requires the applicant to properly maintain the facility, as set forth in 30 TAC § 30.350.
Whether the application complies with TCEQ regulations regarding the prevention of the unauthorized discharge of wastewater during heavy rainfall and facility protection from a 100-year rainfall event, as set forth in 30 TAC § 217.153(b), and 30 TAC 309.13(a).
Whether the application and draft permit contain monitoring and reporting requirements that comply with applicable regulations of the TCEQ, as set forth in 30 TAC Chapter 319, Subchapter A.
Whether or not the applicant provided proper notice of its application as required by TCEQ regulations, as set forth in 30 TAC § 39.551(b) and 39.551(c).

CHSC requests that a duration of seven months be allowed for the hearing, beginning with the date of the preliminary hearing and that the referral to the State Office of Administrative Hearings proceed during any mediation that takes place between the parties.

Respectfully submitted,

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By: 
DUNCAN C. NORTON
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**ATTORNEYS FOR CHAPPELL HILL
SERVICE COMPANY, LLC**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Applicant Chappell Hill Response to Requests for Hearing was served on the following entities or individuals by U.S. Regular Mail, Certified Mail (return receipt requested), hand delivery and/or facsimile at the addresses listed below on this 24th day of May, 2013.

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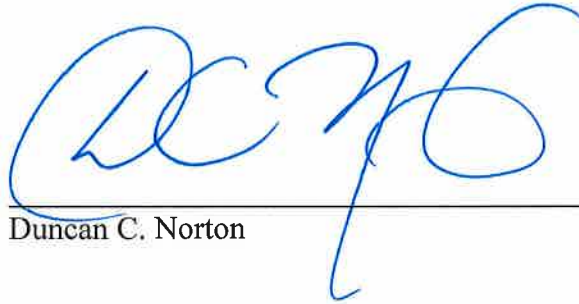
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